MAJUJAYA HOLDINGS SDN BHD

v.

PENS-TRANSTEEL SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: W-02-495 OF 1995]
20 NOVEMBER 1997

COMPANY LAW: *Shares - Rectification of register - Whether directors can rectify register unilaterally - Deregistration of shareholder - Whether notice must be given - Whether must apply under s. 162 of Companies Act 1965 - Rights of registered shareholder - Whether there is burden to prove ownership*

This was an appeal from the order of the High Court dismissing the appellant's application to rectify the members' register of the first respondent company.

On 21 February 1991, a formal joint venture agreement was executed between Transteel Pty Ltd ('Transteel') and Pens Holdings Sdn Bhd ('Pens'). Transteel and Pens were to be equal shareholders, each with RM2 million shares. Pens was to inject cash and Transteel's contribution was substantially in the form of machinery. Transteel appeared to have been under the control of one Alexander Tseberg ('Alex') and one Andrew Pavloff who were both directors of Transteel. The vehicle chosen for the joint-venture was a shell company called Hasrat Klasik (M) Sdn Bhd ('Hasrat'). On 4 June 1991, Hasrat's name was formally changed to Pens-Transteel Sdn Bhd (Hasrat and Pens-Transteel Sdn Bhd are hereinafter referred to as 'the company').

On 26 March 1991 Alex had incorporated a private limited company in Singapore named Majujaya Holdings Sdn Bhd with its registered office in Singapore ('Maju'). The return of allotment made to the registrar of companies confirmed that Maju was allotted 45,000 shares on 4 April 1991, 1,600,000 shares on 26 May 1991 and 355,000 shares on 10 September 1991. The first 45,000 shares was paid for in cash. By a sale and purchase agreement dated 28 October 1993, the Liquidator ('Marchesi') purported to sell to Dasar Meriah Sdn Bhd ('the third respondent') "... any interest in the company to which the vendor is or may be beneficially entitled ...". What was critical was whether the third respondent's arrangement with the company and Pens in putting the deal through was all done whilst Maju was deliberately kept in the dark.

A writ of summons was filed in the High Court by Maju against the company and Pens. Maju's prayers were for an injunction to stop the sale of any of the company's assets or the paying out of any of the company's moneys, for a winding-up order and for the appointment of a Liquidator. Maju's solicitors also filed a winding-up petition (D5-28-370-93) to wind-up the company. The court struck out this petition on the ground that there was duplicity but gave leave to file a fresh petition. Maju's solicitors filed a second petition in the High Court to wind-up the company. Maju filed the petition on the basis that it was still the holder of 2 million shares in the company. It was later discovered by the respondents that Transteel had gone into voluntary winding-up on 26 June 1991 in Victoria. On 6 June 1997, Francis (the managing director of the company) filed an affidavit in opposition. Francis claimed that Maju was no longer a shareholder of the company and exhibited the latest annual return filed with the registrar of companies. The directors of the company had simply deleted Maju's name and substituted the third respondent's name in the belief that Marchesi was beneficially entitled to Maju's shares. The latest annual return dated 23 May 1994 showed that Maju's name no longer appeared in the company's register and the current shareholders of the company as on 23 May 1994 were Selat Teratai Sdn Bhd ('the second respondent) 800,000 shares, the third respondent 400,000 shares and Faktor Istimewa Sdn Bhd ('the fourth respondent') 2,800,000 shares.

On 29 June 1994, Maju's solicitors filed the present originating summons for the rectification of the company's register. It involved the powers conferred by the s. 162 of the Companies Act 1965 ('the Act'). The crux of Maju's claim was that being the registered shareholder of these shares and not having dealt with them in any way by way of sale or otherwise, the company was not entitled to remove its name and substitute somebody on the register as the purported owner of these shares.

Held:
Per Mahadev Shankar JCA

[1] A company can remove the name (of a member) without coming to court if the member does not assert his right to the shares in which case the directors can take his name off the list without communication with him.

[2] Section 162 of the Act is a summary remedy. In cases where the applicant is already on the register, he is entitled as a matter of law to remain there until he has transferred his shares or has been divested of his right to be there by a court order. There is no onus on the registered shareholder to prove his ownership because the law presumes he has a right on the register. In this case, the trial judge had misdirected himself by reversing the onus.

[3] The company should have given notice to Maju of its intention to deregister Maju and apply to the court under s. 162 of the Act. In so far as Maju was concerned, it was asserting a right to the shares.

[4] The respondents were ordered to be severally responsible for the appellant's costs before the Court of Appeal and in the court below. Deposit to be refunded to the appellant.

[Order accordingly.]

Cases referred to:

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1979] 2 MLJ 244 ***(refd)***

Davies v. Buffelsfontein Gold Mining Co Ltd & Another [1967] 4 South African Law Report ***(refd)***

Ex p Shaw [1877] 2 QBD 464 ***(refd)***

PV Damodara Reddi v. Indian National Agencies Ltd [1945] 15 Company Cases 148 ***(foll)***

Re Asian Organisation Ltd [1961] 27 MLJ 295 ***(refd)***

Re Derham and Allen Ltd. [1946] 1 Ch D 31 ***(foll)***

Sabah Penang Development Sdn Bhd v. Yeng Hing Enterprise Sdn Bhd [1996] 1 BLJ 512 ***(refd)***

The Directors of the Reese River Silever Mining Co Ltd and the Liquidators of the Said Company v. Joseph Mackrill Smith [1869] LR 4 GC 64 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 158, 162(1), (2), (3)

Other sources referred to:

Company Law, Pennington, 6th edn, p 337

Principles of Company Law, HAJ Ford, 4th edn, para 1129, p 231

For the appellant - Porres P Royan; M/s Shook Lin & Bok
For the receivers and managers - Logan Sabapathy; M/s Skrine & Co
For the 1st, 4th & 5th respondents - Leong Wai Hong; M/s Skrine & Co
For the 2nd respondent - Ong Chee Kwen; M/s Lee, Ong & Kandiah
For the 3rd respondent - Mathew Thomas Philip; M/s Raja, Darryl & Loh

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D2-24-167-1994]

Reported by Alex Chang

JUDGMENT

Mahadev Shankar JCA:

This is an appeal from an order of the High Court judge dismissing the appellant's application to rectify the members' register of the first respondent company. We allowed the appeal. Our reasons follow.

Izham bin Omar (Izham) was at all material times the Managing Director of the fifth respondent, Pens Holdings Sdn. Bhd. (Pens) which was the industrial arm and investment company of the Perlis State Economic Development Corporation (SEDC) of which he was the General Manager. Around late 1990 early 1991 Pens identified an Australian Company in the State of Victoria named Transteel Pty. Ltd. (Transteel) as a suitable joint-venture partner to assist in the manufacture of steel and pre-cast concrete structures and to submit tenders for construction jobs in Malaysia and abroad. ('Pty' is the Australian abbreviation for 'Proprietary'.) Transteel was in fact the equivalent of a Sendirian Berhad under Malaysian Company Law. Transteel appears to have been under the control of Alexander Tseberg (Alex) and Andrew Pavloff who were both Directors of Transteel. Alex was also Chairman of Transteel.

On 21 February 1991 a formal Joint Venture Agreement was executed between Transteel and Pens. Francis Kwong Wah Chew (Francis) signed for "Transteel or its nominee" which was the style chosen by Alex and Francis to describe the legal entity proposed as Pens' joint-venture partner. It was envisaged that a joint-venture company would be set up with a capital of RM4 million. Transteel and Pens were to be equal shareholders each with RM2 million shares. Pens was to inject cash and Transteel's contribution was to be substantially in the form of machinery.

Pens instructed agents in Australia to provide a written report on the Transteel Group, which was put up on 14 February 1991. Appeal Record pp. 817-822. The Group had current liabilities of A$850,000. Appeal Record p. 822. Transteel also provided an auctioneer's report dated 2 March 1991 stating that the value of Transteel's machinery was A$766,675. Bills of Lading and Customs Declaration have been put in evidence to show that substantial quantities of machinery (the said machinery) were shipped from Melbourne to Butterworth in May 1991. Appeal Record pp. 868-886. These were moved to Perlis where they were valued by Colliers Jordan Lee and Jaafar for Pens on 17 June 1991 for RM1,304,000.

The vehicle chosen for the joint-venture was a shell-company called Hasrat Klasik (M) Sdn. Bhd. (Hasrat). Hasrat was incorporated on 6 February 1991. On 4 June 1991 Hasrat's name was formally changed to Pens-Transteel Sdn. Bhd. Hasrat and Pens-Transteel are hereafter referred to as "the said company". It would appear that by 14 March 1991 Izham, Harun bin Mahmud, Francis and Alex were the first directors. By the board minutes of that day Appeal Record p. 310 it was resolved to allot each partner 45,000 shares of RM1 each. It was further resolved to allot 1,500,000 shares to each party in three stages on 26 March, 10 April and 30 May 1991 so that each party would hold 2 million shares in the company. Pens was to pay cash. Transteel or nominee was to pay in the value of machinery and equipment supplied to the company.

On 26 March 1991 Alex had incorporated a private limited company in Singapore named Majujaya Holdings Sdn. Bhd. with its registered office in Singapore. (This name is calculated to deceive the unwary because it suggests that the company is a Malaysian company). Alex and somebody called Pow Helen were its directors. The sole shareholder was Everluck Consultant Limited in the British Virgin Islands. The issued share capital were two ordinary shares of one Singapore dollar each. Appeal Record p. 335. It remains to be seen if some tax avoidance scheme was intended.

In a letter dated 22 March 1991 Andrew Pavloff described himself as a Director of Transteel, but the letterhead was of another company called Transteel Australia Pty. Ltd. (Transteel Australia). By this letter he formally notified the Managing Director of Pens that Transteel nominated Majujaya Holdings Sdn. Bhd. (Maju) to act instead of Transteel Pty. Ltd., as the joint-venture partner.

At the time Pens did not appear to attach any significance to the different letterhead of Transteel Australia. The party shipping the said machinery was "Transteel Engineers and Structural Contractors". At its Board Meeting on 14 March 1991 the Board accepted that Transteel Australia was the proper party to the Joint Venture Agreement. Appeal Record p. 313 Andrew Pavloff's letter came eight days later.

The return of allotments made Appeal Record pp. 268-277 to the registrar of companies confirmed that Majujaya was allotted 45,000 shares on 4 April 1991, 1,600,000 shares on 26 May 1991 and 355,000 shares on 10 September 1991. As indicated earlier the first 45,000 shares was paid for in cash. The machinery had already been shipped before the second allotment. In this context Maju sent an invoice dated 24 June 1991 stating that the value of machinery supplied was RM1,994,000.

On 28 October 1991 the company executed a debenture to Maybank over all the assets. Evidently the company then went into active business. On 7 October 1992 Alex who was the Managing Director of the company resigned and Francis was appointed in his stead. Subsequently Maju wanted Francis removed. The company disagreed. Serious differences broke out between Maju and Pens and the joint venture agreement was purportedly terminated. The full details do not concern us here. On 5 March 1993 Rhina Bhar & Associates (Rhina) filed a Writ of Summons in the Penang High Court (the Civil Suit) against the company and Pens Appeal Record p. 383. Maju's prayers were for an injunction to stop the sale of any of the company's assets or the payment out of any of the company's moneys, for a winding-up order and for the appointment of a liquidator. A separate interlocutory application was made for the appointment of an interim liquidator. The trial judge dismissed the application on 19 May 1993. A full written judgment was delivered which is reported at [1993] 3 MLJ 179. Also at Appeal Record pp. 361-371. The *ratio decidendi* of this decision was that Maju had had no *locus standi* to maintain that action. It was not concerned with the right of Maju to remain on the register of the company as a shareholder.

However in the course of these proceedings the defendants' solicitors Messrs. Skrine & Co. had discovered that Transteel had gone into voluntary winding-up on 26 June 1991 in Victoria. So the judge in Penang stated it as his opinion that only the liquidator of Transteel could sue on the joint-venture agreement.

After this decision, Maju changed its solicitors and appointed Messrs. Shook Lin & Bok, who filed a petition (D5-28-370-93) to wind-up the company. The court struck out this petition on the ground that there was duplicity with the Civil Suit in Penang but gave leave to file a fresh petition.

Maju's solicitors then discontinued the Civil Suit in Penang on 10 March 1994 and filed a second petition in the Kuala Lumpur High Court to wind-up the company. This was served on the company's solicitors on 14 April 1994. Maju filed the second petition on the basis that it was still the holder of 2 million shares in the company. The second petition was due to be heard on 17 May 1994. It was adjourned at the request of the company's solicitors. On 6 June 1997 Francis (now the Managing Director of the company) filed an affidavit in opposition. (This affidavit is not in this Record of Appeal). In it Francis claimed that Maju was no longer a shareholder of the company. He exhibited the latest annual return filed with the registrar of companies. It is dated the 23 May 1994. See Appeal Record pp. 318-323. It shows that Maju's name no longer appears in the company's register, and that the current shareholders of the company as on 23 May 1994 are:

Selat Teratai Sdn. Bhd. (Selat)	-	800,000
Dasar Meriah Sdn. Bhd. (Dasar)	-	400,000
Faktor Istimewa Sdn. Bhd. (Faktor)	-	2,800,000

Maju's solicitors wrote on 16 June 1994 to the company's solicitors (Messrs. Skrine & Co.) for clarification as to how this had come about. Skrine & Co. did not reply.

On 29 June 1994 Maju's solicitors filed the present originating summons for rectification of the company's register. It involved the powers conferred by s. 162 of the Companies Act 1965 (the Act). The crux of Maju's claim is that being the registered shareholder of these shares and not having dealt with them in any way by way of sale or otherwise the company was not entitled to remove its name and substitute somebody else on the register as the purported owner of these shares.

The same day Maju obtained an *ex parte* injunction preventing all the defendants (who are the respondents in this appeal) from disposing of these shares until further order. The summons was fixed to be heard *inter partes* on 7 July 1994. The respondents applied for security for costs and also opposed the granting of the *ex parte* injunction. Numerous affidavits were filed and the originating summons eventually came up for disposal on 28 June 1995 in chambers. From the Appeal Records before us it appears that the trial judge came to a decision purely on the contentious affidavits filed by the combatants and the submissions made. He did not furnish a reasoned judgment so we are stuck with his notes. His grounds for refusing relief were:

(i) that Maju had not come to court with clean hands;

(ii) that Alex and Andrew Pavloff had conspired to defraud the creditors of Transteel via Dramdon Pty. Ltd. and a change of its name to Transteel and then putting Transteel into voluntary liquidation;

(iii) that since Maju was only a nominee of Transteel only the Liquidator of Transteel had true title to the shares;

(iv) that the company were *prima facie* entitled to transfer the shares in Maju's name at the hand of the liquidator;

(v) that Maju's proper route for relief was not by way of an originating summons under s. 162 of the Act but by writ.

We will return later to the cases cited by the trial judge in support of his orders. He dismissed the originating summons with costs to be paid forthwith. The interim injunction fell with the dismissal and he refused an Erinford injunction unless the respondents' costs were secured.

Maju appealed to this court and obtained and an interim injunction here. Skrine & Co. were on record for the first, fourth and fifth respondents, Lee Ong & Kandiah for the second respondent (Selat) and Raja Darryl & Loh for the third respondent (Dasar).

By the time the appeal was fixed for hearing the company went into receivership. On 2 November 1996 Syarikat Hwe Bee had presented a winding-up Petition No. 28-13-1996 to be heard on 3 May 1997. Pursuant to the debenture created by the company on 28 October 1991 Malayan Banking gave written notice under s. 186 of the Companies Act on 19 December 1996 to the registrar of companies that it had appointed Kenneth Teh of Price Waterhouse as receiver of the undertaking and property of the company.

Mr. Leong Wai Hong of Skrine & Co. informed us that as solicitor on record for the company he had forwarded the Appeal Records to Price Waterhouse who took advice from their own solicitors Messrs. Logan Sabapathy & Co. who had advised Price Waterhouse not to take part in the these proceedings as a winding-up petition had already been filed.

Our enquiries to counsel as to how it came about that Maju's shares had been transferred by the company without any opportunity being given to Maju to show cause were not answered to our satisfaction. Maju's solicitors' enquiries to the company's solicitors met with a wall of silence. It has to be remembered that at the time the transfers were made there was pending litigation between Maju and the company in which it must have been obvious to the company that Maju was claiming ownership of these shares. Our enquiries to counsel as to whom Maju's shares had been transferred did not produce a satisfactory response. Encik Porres P. Royan of counsel for Maju could only go by the return of allotments to the registrar of companies. The company had refused to give his firm access to the company's register.

In these circumstances we directed the receiver and manager of the company and his solicitor to present themselves before the court on 22 May 1997 and to produce the relevant company's share register. They did so. Encik Logan Sabapathy produced both the members' register and the register of transfers. Photocopies were taken of the relevant entries. Encik Logan Sabapathy submitted that the receiver and manager could not assist the court further because any rectification, if ordered, must be done by the Directors under their residual powers. There are now two winding-up petitions against the company

– one in Alor Setar by a creditor and the other in Kuala Lumpur (the second petition). The Alor Setar petition had been adjourned to 9 July 1997. Encik Logan Sabapathy also drew our attention to *Principles of Company Law* (4th Edn) by H.A.J. Ford (Butterworths) (1986) para. 1129 at p. 231 which sets out all the relevant authorities that an application to have the register rectified must be made before the commencement of the winding-up.

Once the registers were before the court it became quite clear what had happened and when and where Maju's shares went. The contentious affidavits filed by the respective parties in the court below may have the appearance of a high degree of credibility, but it has to be remembered that documents and the "facts" alleged therein do not prove themselves. They have to be proved in the manner required by the Evidence Ordinance 1950.

The investigative report obtained by Pens from Tantau Walles Pty. Ltd. on 14 February 1991 suggests that Alexander Tseburg, Andrew Pavloff and Paul Savenkov were the principal owners and controllers of the Transteel Group of Companies. Appeal Record p. 817. After deducting current liabilities and secured loans the Group is said to have nett assets of A$3,475,000. Appeal Record p. 822. If so Transteel was quite solvent then.

The joint venture agreement was signed on 21 February 1991. Appeal Record p. 822. On 4 March 1991 Transteel entered into a written agreement with Dramdon Pty. Ltd. (Dramdon). Appeal Record p. 298. By this Agreement, Transteel sold all its assets for A$329,063.21. On 1 March 1991 Dramdon had received the consent of Transteel to use the name Transteel Australia. The relevant documents were sent to the registrar of companies Victoria on 7 March 1991 and thereafter Dramdon commenced to use the name Transteel Australia. The letter to Pens nominating Maju dated 22 March 1991 may have been on the Transteel Australia's letterhead but it was signed by Andrew Pavloff for Transteel as its Director.

On 12 April 1991 it is said that the name of Transteel was changed to Dlimoz Pty. Ltd. Dlimoz Pty. Ltd. is said to have been put into compulsory creditors' liquidation on 26 June 1991. Appeal Record p. 511. But by this date the said machinery had already got into the custody of the company in Perlis. They were shipped from Melbourne in May after they had been purportedly **sold** by Transteel on 4 March 1991 to Dramdon aka Transteel Australia, who was thus a principal and not an agent of Transteel *vis-a-vis* the company.

In a nutshell the respondents' submission is that the Transteel's sale to Dramdon was a scheme by Alex and Andrew Pavloff to defraud the creditors in Australia. The issue here in Perlis however is whether Dramdon had a good

enough title to pass to the company. It may be that Transteel, Dramdon and Maju were owned and controlled by the same group of people but the issue is whether Maju gave good consideration for the shares.

After the dismissal of Maju's interlocutory application for appoint of a liquidator but while the Penang Suit was still pending, it appears that negotiations were commenced by Francis (now wearing the Dasar hat) and/or/his agents with the Liquidator of Transteel for the sale of the shares registered in Maju's name. By a Sale & Purchase Agreement dated 28 October 1993 the Liquidator (Marchesi) purported to sell to the third respondent, Dasar "any interest in the company to which the vendor (ie, the liquidator aforesaid) is or may be beneficially entitled.

Part 5 of this Agreement reads Appeal Record p. 778:

Part 5. Warranties.

5.1 The Vendor warrants to the purchaser that to the best of the knowledge, information and belief of the Vendor:

(1) the Vendor is the beneficial owner of the Vendor's Interest;

(2) the Vendor has never authorised Majujaya Holdings Sendirian Berhad to act as his representative, agent or nominee; and

(e) the vendor has never authorised Alex Tseberg, John Pavloff, Andrew Pavloff and Paul Savenkov to represent the vendor.

5.2 The purchaser acknowledges that:

(1) the existence of the Vendor's interest, if any, is together with other matters the subject of litigation in the High Court of Malaya at Penang in suit number 22-73-93 between Majujaya Holdings Sendirian Berhad as Plaintiff and Pens-Transteel Sendirian Berhad and Pens Holdings Sendirian Berhad as Defendants; and

(2) the Vendor does not make any representation or give any warranty as to the possible outcome of such litigation.

5.3 The Purchaser warrants to the Vendor that to the best of the knowledge information and belief of the Purchaser the information submitted to the Vendor's solicitors by the Purchaser's solicitor, Laino & Co., by letter dated 10 September, 1993 is true and correct.

Paragrah 5.2(1) is of special interest because both the liquidator and Dasar had full notice of Maju's claim to the shares which were now to be "sold" at a small fraction of their face value. Dasar's Australian solicitor's letter dated 10 September 1993 Appeal Record p. 764 shows that it was working in close

coordination with Pens and the company. Indeed Maju asserts that the purported sale agreement between Dasar and Marchesi was in fact signed for Dasar by Francis as Director of Dasar Appeal Record pp. 780 and 178 Francis was also a director of the company at all material times.

What is critical for the purposes of the appeal now before us, is the fact that Dasar's arrangements with Marchesi and the actions of the company and Pens in putting the deal through were all done whilst Maju was quite deliberately kept in the dark. It is very curious that the sale agreement with Marchesi did not mention the transfer of any shares but "the vendor's interest".

The role that a company has when it comes to the transfer of its shares is set out in its Memorandum and Articles of Association (the M & A) and in Company Law. The following articles of the company's M & A are relevant:

3. The Company is a Private Company and accordingly:

(a) the right to transfer shares is restricted in manner hereinafter prescribed.

SHARES

Trust not to be recognised

6. No person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or be required in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any other rights in respect of any share other than an absolute right to the entity thereof in the registered holder except only as by these Articles otherwise provided for or as by Act required or pursuant to any order of court.

TRANSFER OF SHARES

Transfer in writing

21. Subject to the restriction of these Articles, shares shall be transferable but every transfer shall be in writing in the usual common form or in such other form as the directors shall from time to time approve, and shall be left at the office accompanied by the certificate of the shares to be transferred and such other evidence (if any) as the directors may reasonably require to show the right of the transferor to make the transfer.

Transferor's Right

22. The instrument of transfer of any share shall be executed by or on behalf of the transferor, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members in respect thereof.

Directors may refuse registration of transfers.

23. The directors may, in their discretion, and without assigning any reason thereof, refuse to register a transfer of any share to any person of whom they do not approve, and they may also refuse to register a transfer of any share on which the Company has a lien. If the directors refuse to register a transfer they shall within one month after the date on which the transfer was lodged with the Company sent to the transferee notice of the refusal in accordance with section 105 of the Act.

FORFEITURE OF SHARES

Notice to pay calls.

28. If any member fails to pay the whole or any party of any call or instalment of a call on or before the day appointed for the appointment thereof, the directors may at any time thereafter during such time as the call or instalment or any part thereof remains unpaid, serve a notice on him or on the person entitled to the share by transmission requiring him to pay such call or instalment or such part thereof as remains unpaid, together with interest at such rate not exceeding 10 per cent per annum as the directors shall determine and any expenses that may have accrued by reason of such non-payment.

As the company's minutes show all Maju's shares were paid-up so art. 28 did not apply. Article 6 enjoined the company to recognise Maju's absolute right to its shares except as otherwise provided for by the articles or by the Companies Act or pursuant to any order of court.

In answer to this court Mr. Leong of counsel for the first, fourth and fifth respondents said that it is possible that Marchesi signed the transfers from Maju to Dasar. (But no such transfer forms have been produced to the court). Alternatively he said the directors just deleted Maju's name from its books and substituted the name of Dasar. He then went on to state that he believed that on the advice of a Penang firm of solicitors, the directors of the company simply deleted Maju's name and substituted Dasar's name in the belief that Marchesi was beneficially entitled to the Maju's shares!

This is the proper time for us to comment on the company's register of members and its register of transfers. We were not impressed with the lack of chronological order or the haphazard way these statutory books were maintained by the company secretary but we will let that pass for the moment. The register of members shows at p. 6 that Maju was entered as a member on 4 April 1991 and ceased to be a member on 26 January 1994. The shares acquired column shows:

4/4/91 45,000 shares allotted by certificate 6.

26/5/91 1,600,00 shares allotted by certificate 10.

10/9/91 355,000 shares allotted by certificate 12.

The shares transferred column shows that all three lots were transferred on 26 January 1994 but the entry for the 45,000 comes last. There is a cross-reference to folio 8 which shows the transferee.

At folio 8 it is observed that on 26 January 1994 Dasar was issued:

Certificate 15 for 355,000

Certificate 16 for 1,600,000

Certificate 31 for 45,000

The same day ie, 26 January 1994 Dasar transferred 1,600,000 shares by Certificate 16 to Selat (see folio 7) who were issued two Certificates 17 and 18 for 400,000 shares each and four Certificates 19, 20, 21 and 22 for 200,000 shares each.

Selat in turn sold these 1,600,00 shares on 2 February 1994 to Faktor who were issued Certificates 23, 24, 25, 26, 27 and 28.

After transferring the 1,600,000 shares to Selat on 26 January 1994 by Certificate 16, Dasar still had Certificate 15 for 355,000. No explanation has been forthcoming as to why if Dasar had in fact bought all the Maju's shares on 26 January 1994, it should have been issued its Certificate 31 on some date after 13 April 1994 (when Certificate No. 30 was issued to Faktor – see folio 9). At the time of this hearing Dasar had 400,000 of Maju's shares.

To complete the picture we should add that Pens who held Certificates 5, 7, 8, 9 had sold its 2 million shares on 25 October 1993 to Selat who were issued two Certificates – 13 for 800,000 and 14 for 1,200,000. On 8 February 1994 Selat sold 1,200,000 shares to Alcena Development Sdn. Bhd. (Alcena) (Certificate 29). Then on 13 April 1994 Alcena sold these shares to Faktor who were issued Certificate 30. We are not concerned with these shares which originated from Pens. Their limited interest to the present exercise is the inference that Maju's 45,000 shares for which cash was paid (by whom) may have been thought originally to be excluded from the Marchesi's sale but was subsequently brought in, and that Pens had over Pens-Transteel at the time the agreement was being negotiated with and then concluded with Marchesi on 28 October 1993, and therefore acted in collusion with the others involved.

Probably because the joint-venture agreement provided that neither party should sell its shares before they had been offered to the other, Maju had prayed in its originating summons (prayer 4(b)) that Pens should also be restored as the holders of 2 million shares. Before us Maju's counsel agreed that this prayer be withdrawn. Accordingly we struck out the appeal against Pens Holdings, but reserved costs till the conclusion of the appeal. We will deal later with the reasons why we did not order any costs for Pens Holdings but directed them to be severally liable for the appellant's costs here.

We now turn to the legal principles applicable to this case. As Encik Leong so pithily put it the only issue before the court in this appeal is whether the directors of the company could unilaterally amend the company's register by way of purported rectification. He boldly submitted that the Board of Directors of a company had a discretion to determine who was the rightful owner of its shares and to rectify its register to reflect the true ownership without the necessity of a court order. He further submitted that s. 162 of the Act only came into play if the discretion had been wrongly exercised in which case the company would have to face the consequences.

This attitude, with respect, has dangerous implications, because it could easily lead the legitimation of a widespread current belief that a real or imagined capacity to pay "damages" in the hereafter is a licence to inflict instant pre-emptive injury. Too many litigants get their awards so many years later that victory is academic or worse still pyrrhic! This is not something we should encourage.

The starting point here is s. 158 of the Companies Act 1965 (the Act) which reads:

158(1) Every company shall keep a register of its members and enter therein

(a) the names, addresses, the number of the identity card issued under the National Registration Act 1959 if any, nationality and any other relevant information and particulars of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number (if any) or by the number (if any) of the certificate evidencing the members' holding and of the amount paid or agreed to be considered as paid on the shares of each member;

(b) the date at which the name of each person was entered in the register as a member;

(c) the date at which any person who ceased to be a member during the previous seven years so ceased to be a member; and

(d) in the case of a company having a share capital, the date of every allotment of shares to members and the number of shares comprised in each allotment.

(2) Notwithstanding anything in subsection (1) where the company has converted any of its shares into stock and given notice of the conversion to the Registrar, the company shall alter the register to show the amount of stock or number of stock units held by each member instead of the number of shares and the particulars relating to shares specified in subsection (1)(a).

(3) Notwithstanding anything in subsection (1) a company may keep the names and particulars relating to persons who have ceased to be members of the company separately and the names and particulars relating to former members need not be supplied to any person who applies for a copy of the register unless he specifically requests the names and particulars of former members.

(4) The register of members shall be *prima facie* evidence of any matters inserted therein as required or authorized by this Act.

(5) Every company having more than fifty members shall, unless the register of members is in such form as to contitute in itself an index, keep an index in convenient form of the names of the members and shall, within fourteen days after the date on which any alteration is made in the register of members, make any necessary alteration in the index.

(6) The index shall in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found.

(7) If default is made in complying with this section the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Two thousand ringgit. Default penalty.

This company's register had not been scrupulously maintained but there is enough there for Maju to invoke s. 158(1)(4).

Next we must look at s. 162(1), (2) and (3) of the Act, which read:

162(1) If:

(a) the name of any person is without sufficient cause entered in or omitted from the register; or

(b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person aggrieved or any member or the company may apply to the court for rectification of the register, and the court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.

(2) On any application under sub-s. (1) the court may decide:

(a) any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members of alleged members on the one hand and the company on the other hand; and

(b) generally, any question necessary or expedient to be decided for the rectification of the register.

(3) The court when making an order for rectification of the register shall by its order direct a notice of the rectification to be so lodged.

By way of caution we would observe that s. 34 of the United Kingdom (UK) Companies Act 1862 which is the equivalent of our s. 162 makes specific reference to "the justice of the case". This UK section was considered by the Court of Appeal Singapore in *Re Asian Organisation Ltd.* [1961] 27 MLJ 295, which was cited to us by the respondent as authority for the proposition that the court had a discretion as to whether it should exercise its power under s. 101 of the Companies Ordinance (Cap. 174). The UK section can be found in *Ex parte Shaw* [1877] 2 QBD 464. The material words in our s. 162 are "and the court may refuse the application or may order the rectification of the register ...". The U.K. section reads, "and the court may either refuse such application ... with or without costs to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register ...". *Re Asian Organisation Ltd.* was not a case where the application for rectification was being made by a member complaining that his name had been unlawfully removed from the register. There two Managing Directors of that company had handed one J Moggre a share certificate certifying that Moggre was the holder of 500 shares in the company. Subsequently these same Managing Directors and others **sought a court order** to remove Moggre' name from the register on the ground that there had been no valid allotment. The court refused. The report is of some interest because at p. 297, right hand column, at D it was noted that in reversing the decision of Kekewich J in *Bellerby's* case the English Court of Appeal took note that the unilateral removal of the names of shareholders by a company from its register could be *ultra vires*:

a What was decided by the Court of Appeal was that when a company has performed an act which is *ultra vires* by removing the names of surrenderors of shares from the register, the surrender being illegal, null and void in the circumstances in which it was made, the company cannot rely on lapse of time or acquiescence to validate what was illegal, null and void.

b The question now is whether in view of the difference in the wording of our section it could be urged that the aggrieved shareholder was entitled as a matter of law to have the register rectified. To put it another way, the power of the court under s. 162 was no longer a matter of discretionary relief.

c The respondents contended that because there was fraud here the directors could unilaterally rectify and take the consequences. Before we deal with the cases cited in support of this proposition we feel obliged to say that there was only an allegation of fraud here, which is a very different thing. And that allegation was that the transfer by Transteel to Dramdon on 4 March 1991 followed by the act of putting Transteel into voluntary liquidation on 26 June d 1991 was in fraud of Transteel's creditors. With respect we have not seen any finding by any Australian Court that a fraud was committed. A Malaysian Court requires a very high standard of proof before it will find a charge of fraud has been established. The real issue as between Dramdon and Transteel's creditors and perhaps even Marchesi was whether Transteel gave Dramdon e good title to the assets on 4 March 1991. As far as Pens was concerned that issue was *res inter alios acta.* So far as the company was concerned the issue as regards the said machinery is whether, if Dramdon had good title, it gave the company good title to the machinery. As controllers of these companies it seems that Alex Tseberg and Andrew Pavloff could more or less do what f they liked with their assets. But that is neither here nor there. The fact is that the issues of passing of titles and ownership of the said machinery at each state of activity are all issues at large and yet to be determined.

The directors of the Reese River Silver Mining Company Limited and the Liquidators of the Said Company v. Joseph Mackrill Smith [1869] LR 4 GC g 64 was the first case cited in support of unilateral rectification. There the applicant for relief in the High Court (Smith) claimed that he was induced by fraud to become a member of the company. He applied to court for his name to be removed. (So this was **NOT** a case of unilateral removal). The passage relied on is at pp. 74 and 75 of the judgment of the Lord Chancellor h (Lord Hatherley). It reads:

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> I apprehend the true view of the case is this. The agreement is valid until rescinded. If in a case of this description the directors had committed the fraudulent act of putting a man's name upon the list which they ought not to have put there, and had allotted him shares, so that if it turned out to be beneficial it would be competent to the person to say, "Now I elect to hold them, because, although coming to me by your fraud upon me, I find it is beneficial to me to hold them, and you cannot aver your own fraud to prevent my so doing;" in that case the directors could not have taken the name off the list without communication with him. But if immediately that he knows what the directors have done, he says, "I have made up my mind to reject the contract, and I assert that intention of mine in the plainest and most open manner competent to me, by my communication to you insisting upon having my name removed, and on your neglecting your duty to remove my name I proceed to file my bill to compel you to do so," – I take that thereupon the contract is at an end, and the gentleman is entitled to have his name removed from the list. Because it was the duty of the directors not to wait for the filing of the bill, if they knew, as we assume them to have known that the contract had been entered into upon these fraudulent representations. The moment they were told that the contract was rejected, and that he claimed no interest, under that fraudulent act of theirs, it was their duty to remove his name, which could no longer be retained there, the contract being thus avoided, and by that means to spare all further controversy.

So the company can remove the name without coming to court, where the member does not assert his right to the shares in which case the directors can take his name off the list without communication with him. Where the member repudiates his "right" to be on the register and the Directors accept that repudiation, the contract between the company and the member is at an end and his name may be removed also. In the case of shares which are not fully paid up different rules may well apply. However so far as Maju is concerned, it was asserting a right to their shares. The directors of the company did not communicate with Maju before Maju's name was removed.

The other case was *Central Securites (Holdings) Bhd. v. Haron bin Mohamed Zaid* [1979] 2 MLJ 244 at 250. The passage relied upon is from the judgment of Raja Azlan CJ Malaya (as he then was) in the Federal Court.

The salient facts of that case for our present purposes are as follows. On 12 March 1975 Haron bin Mohamed Zaid (Haron) agreed to sell 560,000 shares in United Holdings Bhd. to Syarikat Seri Padu Sdn. Bhd. (Padu) at RM8 per share. Padu paid in full. Haron only delivered 36,722 shares. Haron claimed that the 560,000 shares he had sold Padu was part of 1,400,000 shares he had bought from Central Securities (Holdings) Bhd. (CSB) on 7 December 1974. On 22 January 1975 Haron had paid CSB in full. CSB delivered the share certificates and instruments of transfer. One of the share certificates was

numbered 0227 for 523,278 shares. The relevant instrument of transfer should have been executed by the registered shareholder Dr. Chong Kim Choy in favour of CSB. It was not, but in favour of International Holdings (Pte) Ltd. The error was not detected. Padu was registered as transferee of all 560,000 shares. In 1977 when the error was detected United Holdings Bhd. de-registered Padu and re-registered Dr. Chong Kim Choy as holder of the 523,278 shares. Padu sued Haron for a refund of the moneys paid for the 523,278 shares. Haron brought third party proceedings against CSB. CSB appealed. It contended that when Padu was registered by United Holdings, Padu's claims were satisfied, and that United Holdings' unilateral de-registration of Padu was wrongful, because it was not entitled to do so without a court order under s. 162 of the Companies Act. The passage relied upon by the respondents reads:

> The question, they contend, is whether United Holdings, having once registered the plaintiffs as shareholders, are entitled *ex propio motu* to strike them off the register? They argued on the strength of what was said in *Ward v. South Eastern Railway* 119 RR 968 United Holdings, having chosen to put upon the register persons having a perfectly good equitable title to be there, cannot afterwards of their own will and pleasure taken them off on the simple ground that there is a flaw in their legal title. Since the register of members is *prima facie* evidence of matters inserted therein as required or authorised by s. 158(4) of the Companies Act, it it further argued on the authority of *Re Derham and Allen Ltd.* [1946] Ch 31, 36 that only the court can rectify it on proper application under s. 162; accordingly it is wrong on the part of United Holdings unilaterally to strike the plaintiffs' name off the share register. Since the plaintiffs are to be recognised as the registered owner it lay within their power to initiate rectification of the register. Section 162 is relevant in the present case and the learned judge was in error when he held that it was not.
>
> The defendant's case is based on the proposition that what is shown in the register of members is not conclusive and that the company may rectify the register on the ground of mistake without going to court. Since the registrar of United Holdings had the power and had made the rectification, to go to court is irrelevant. A further argument is that what he had asked for was title to the disputed shares; it is patent from the instrument of transfer exh. 'H1' that title was not transferred to him. In the circumstances it is suggested that the learned judge was not in error when he held s. 162 was not relevant.
>
> The point has been considered many times in many cases. We do not propose to refer to all of them, but it is worth referring to a few which put the matter in its proper perspective. **The power to rectify** the register under the section **is a summary remedy.** The court on an application under the section may decide any question of title of any party to have his name entered or omitted from the register, whether such question arises between members and alleged members or between such persons and the company. It may also decide any

incidental questions arising with the above, if expedient or necessary. Sometimes the summary procedure under the section **is not an appropriate remedy.** Thus where complicated **questions of law and fact arise** it is, we think, **only proper to refer the parties to a suit,** because rectification can also be had by a suit: see In *re Len Chee Omnibus Co. Ltd*. [1969] 2 MLJ 202 In *Reese River Silver Mining Co. Smith* [1869] LR 4 HL 64, the application for rectification of the register on the ground of fraud and misrepresentations was **by way of a suit** against the company. And delay in applying for rectification will destroy the remedy. See *In re Len Chee Omnibus Co. Ltd. supra,* where it was held that two years delay was fatal; *Ansett v. Butler Air Transport Ltd.* [1958] 75 WN 299, where a suit for rectification of the share register was delay in almost a year, it was held that the plaintiffs **were not entitled to** relief.

In the present case United Holdings had taken upon itself to rectify the register without any application to court for that purpose, and in justification of this procedure we were referred to the judgment of Jessel MR in *In re Poole Firebrick and Blue Clay Co. Ltd.* [1874] LR 18 Eq 542 (a case of common mistake and both parties willing to rectify), to *In re Reese River Silver Mining Co., supra,* **(directors should not wait for the filing of the bills to rectify the register if they knew that the contract had been entered into upon fraudulent representations)** and to *Re Derham and Allen Ltd., supra* (issues of shares at a discount require the sanction of the court). In this connection the observation of Cohen J in that case is opposite (p. 36):

> I wish to say nothing to encourage directors to carry out rectification of a company's register without an order of the court being obtained in proceedings in which the right to rectification is duly established. The protection of the court's order is in the ordinary case essential to any rectification of the register by the removal of the name of a registered holder of shares.

In the present case **United Holdings dispute the propriety of the plaintiffs to be on their register** and in this regard we would refer to the observation of McCardie J in *First National Reinsurance Co. v. Greenfield* [1921] 2 KB 260, 279:

> I should add this with regard to the rectification of the register that an application to the court is only essential when the company disputes the right to rectification.

To that we need only add that expulsion of a member from the register is a serious matter and the company cannot take upon itself to alter it. (Emphasis added).

Far from supporting the respondents or the trial judge's reliance thereon, this decision was flatly against them. Padu did not contest the act of United Holdings in de-registering them. Dr. Chong's re-registration restored the *status quo*. Nobody applied under s. 162, so the propriety of United Holdings rectification was a non-issue. The final paragraph from the passage cited is especially relevant. The expulsion of Maju was not only a serious matter but their right was then *sub-judice.* The company should not have taken upon itself to alter the register.

The fact that it kept very quiet about this until 12 July 1994 Appeal Record p. 801 does no credit to all the Board Directors of the first respondent and the fifth respondent (who controlled the company at the material time). It is our confirmed opinion that they should have given notice to Maju of their intention to deregister Maju and apply to court under s. 162 of the Act.

The third case cited by the respondents is *In re Derham and Allen Limited* [1946] 1 Ch. D 31. The relevant passage at p. 36 in fact frowns on unilateral rectification, and the company escaped more serious censure because no one was prejudiced.

Very persuasive authorities were cited to us by Maju's counsel which went the other way. The key passage in *Company Law* by Pennington (6th Edn) (Butterworths) at p. 337 reads:

> The summary procedure for rectification may be used if the allotments of shares to the applicant was void, *Re Derham and Allen Ltd* [1946] Ch 31 (shares improperly issued at a discount): *Re Transatlantic Life Assurance Co Ltd* [1979] 3 All ER 352 [1980] 1 WLR 79 (shares issued with requisite Treasury consent under the Exchange Control Act 1947, s. (91), or was voidable because of misrepresentations made by the company to induce him to subscribe. *Re Russian (Vyksounsky) Ironworks Co, Steward's Case* [1866] 1 Ch App 575; *Re Blair Open Hearth Furnance Co* [1914] 1 Ch 390. *It may also be used where there are rival claims to the same shares by different persons, Re Diamond Rock Boring Co, ex p Shaw [1877] 2 QBD 463; Re Tahiti Cotton Co, ex p Sargent [1874] LR 17 Eq 273. This is now expressly sanctioned by the Companies Act 1985, s. 359(3), and it is here that the company's right to apply to the court is useful in order to determine a dispute to which it is not a party.* Companies Act 1985, s. 359(1). See, for example, *Re Indo-China Steam Navigation Co* [1917] 2 Ch 100. (Emphasis added).

Then we were referred to *P.V. Damodara Reddi v. Indian National Agencies Ltd.* [1945] 15 Company Cases 148 where the first headnote reads:

Held, (1) that the removal by the company of the applicants' names from the register of members was wholly illegal. The register of members is a public document and there is no provision in the Companies Act which permits the directors or any officer of a company to make any alteration to the register in the circumstances of this case. The remedy of the company was to apply to the court under s. 38 for the rectification of its register.

And finally *Davis v. Buffelsfontein Gold Mining Co. Ltd. and Another* [1967] 4 South African Law Report p. 631 where the headnote reads:

Section 32 of the Companies Act, 46 of 1926, as amended, is not exhaustive and does not negative all case of alteration of the register other than those enumerated in the section.

The right to be on the company's register is independent of ownership of share.

In the application for an order directing the first respondent to rectify its register in respect of shares which had been transferred out of the name of the applicant's wife pursuant to a forged transfer, the person into whose name the shares had been registered being a *peregrinus*, second respondent.

Held, that a request by the applicant for the name of the second respondent to be deleted as a respondent in the proceedings should be granted.

Held further that a rule nisi should issue calling upon the respondent to show cause why the register should be rectified, the rule and notice of motion to be sent to the *peregrinus* at his postal address.

At p. 633 Galgut J said:

In *Jeffery v. Pollak Burns and Freemantle*, 1938 AD 1, shares had been transferred pursuant to a forged transfer and also been registered in the name of the person who acquired the shares under the forged transfer form. At p. 18, when dealing with s. 32, Stratford JA said:

The importance of a proper appreciation of the terms of the section is two-fold. In the first place there is no onus on the person previously on the register to prove his ownership and secondly the court is not necessarily concerned with ownership at all, for, as it admitted, the right to be on the register may be independent of ownership. It would thus have been quite proper for the Local Division to have confined itself to the minor and direct dispute, to have the register rectified or to have refused to do so, and have left the parties thereafter to debate the question of ownership in a trial action. If the question had been so confined I have little doubt that the application should have been granted, for, on that question, how did the matter stand? Prior to the substitution the applicant's name was on the register. The respondent Freemantle induced the company to substitute his name for that of the

> appellant by producing to it a forged transfer form purporting to be signed by the appellant. Thus Freemantle claimed to derive his right from the appellant. That claim was baseless for the forged transfer was in law a nullity. Once that was established, the mistake made by the company (induced by the forgery) must obviously be rectified and applicant's name restored. This would leave Freemantle free in a proper proceeding, to dispute the appellant's right to the shares and right to be on the register and assert his own superior title to the shares.
>
> It is thus clear that the right to be on the register is independent of ownership of the shares.

Mr. Philip, counsel for the third respondent relied on *Sabah Penang Development Sdn. Bhd. v. Yeng Hing Enterprise Sdn. Bhd.* [1996] 4 MLJ 589 to support the view that s. 162 of the Act was a discretionary remedy exercisable on equitable principles. With respect, as indeed YA John Chong recognised, s. 162 of the Act had no application to the facts of that case because the applicant's name was on the register. At p. 595 is this passage:

> It is common ground that the applicant's shares were suspended by the company at its general meeting held on 31 December 1981. The question that arises for consideration is whether the suspension could afford a ground for rectification of the register under s. 162. On this point, learned counsel for the company submits that the section has no relevance to the applicant's motion on the ground that the applicant's complaint is not one that is catered under the section, ie, that it does not fall within any of the pre-conditions set out in sub-s. (1)(a) and (b), because the applicant's name has not been omitted from the register – only the applicant's rights and privileges have been suspended pending clarification of payment for the shares, which the applicant has agreed to give to the company.

To sum up we would prefer to say that s. 162 is a summary remedy. In cases where the applicant is already on the register he is entitled as a matter of law to remain there until he has transferred his shares or has been divested of his right to be there by a court order. Contrary to the submission of counsel for the respondents there is no onus on the registered shareholder to prove his ownership because the law presumes he has a right to be on the register. In this case the trial judge misdirected himself by reversing the onus. The resort to a trial in complicated cases is a matter of procedural convenience to aid the factual determination of the issues involved.

We gave our decision very quickly because it was clear to us that this matter should be disposed of in a summary way. We have taken time to deliver this judgment because of the importance of the issues involved. We want to make it clear that this decision relates purely to Maju's right to remain on the register. We express no opinion on the issue of the ownership of the shares. That must be decided elsewhere.

Finally there is the question of costs. As will be recollected all the respondents were aware or ought to have been aware of the pending litigation between Maju and the company. By going about the way they did, the first, third and fifth respondents took the law into their own hands. In all the circumstances we considered that all the respondents should be severally responsible for the appellant's costs before us and in the court below, and we ordered accordingly. We also ordered that the deposit be refunded to the appellant.